

APPEAL NO. 93503

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993), a contested case hearing was held in (city), Texas, on June 1, 1993, (hearing officer) presiding as hearing officer. The sole issue was the reduction in attorney's fees from the requested 23.50 hours to the approved 18.00 hours.

The hearing officer found, *inter alia*, that 23.50 hours was not reasonable and that the one issue presented in the underlying workers' compensation claim, maximum medical improvement (MMI), was neither novel nor difficult. He further concluded that the higher fee requested was not justified by the effort necessary to preserve the client's interest or by the factual or legal complexity of the issue. The attorney appeals these findings and conclusion.

DECISION

We affirm the hearing officer's decision.

The standard of review for approval of attorney's fees is abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92375, decided September 14, 1992. The attorney urges reversal based on the complexity of the case, the time and effort she expended to preserve her client's interests and the results she achieved for her client.

Pursuant to Article 8308-4.09, the Texas Workers' Compensation Commission (Commission) published Rule 152.4, Guidelines for Maximum Hours for Specific Services Performed by a claimant's attorney. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.4 (Rule 152.4). Approval of higher fees is authorized if the attorney demonstrates that "the higher fee was justified by the effort necessary to preserve the client's interest, or the complexity of the legal and factual issues involved." Rule 152.4(c).

Of the 18 hours awarded for attorney's fees in this case, the guideline maximum of eight hours was awarded for the benefit review conference (BRC) and contested case hearing (CCH) on the sole issue of MMI. Claimant argues that this issue was unusually complex because she had to overcome the statutory presumption in favor of the designated doctor's determination that MMI had been reached on June 2, 1992, with an impairment rating of zero percent. See Articles 8308-1.03(15) and 8308-4.25(b). At the CCH on this issue, conducted on November 17, 1992, the attorney presented documentary evidence, consisting mostly of doctors' reports and diagnoses, and two witnesses, the claimant and his wife. Contrary to the opinion of the claimant's doctor, both the designated doctor and the carrier's doctor concluded that MMI had been achieved. The report of the designated doctor, however, was somewhat self-impeaching in stating that the claimant could return to work only after completion of a work hardening program and a medical reevaluation. The hearing officer concluded that the claimant had not reached MMI. This decision was not appealed by the carrier or employer and the carrier subsequently reinstated temporary income benefits (TIBS) which were suspended on June 2, 1992. The carrier presented

only documentary evidence at this hearing.

The determination of MMI is critical in nearly all disability benefit cases. Not infrequently it is a contested issue. We believe that the maximum fees established in the guidelines accommodate the likelihood that MMI will be contested. Although the attorney was faced with a statutory presumption in favor of the designated doctor, we do not find that for this reason alone, the issue was inherently more complex than in other cases. Indeed, the evidence presented reflects no unusual approach or unique difficulties confronted that would justify a higher fee.

The attorney also contends that the time and effort expended by her was necessary to protect her client's interests. The hearing officer sustained an award of 10 hours for client conferences which we construe to extend to witness interviews, document review and preparation and other attorney efforts on behalf of the client. The guidelines provide for a maximum of two hours per month for client conferences. A review of the evidence presented by the attorney discloses that she had client conferences from June through November 1992. These consisted mostly of telephone conversations and document generation and review. The monthly hours ranged from approximately one-half to over eight hours and, according to her own records, included extensive time devoted to file organization. Under these circumstances, the conclusions of the hearing officer to sustain and award these 10 hours "gives us some pause." Texas Workers' Compensation Commission Appeal No. 93469, decided July 23, 1993. Nonetheless, we are willing to give the hearing officer reasonable leeway in arriving at his findings under the abuse of discretion standard of review, particularly when the award is not on its face shocking or outrageous.

Finally, the attorney submits that the favorable resolution of the case at the November 17, 1992, CCH justifies a higher award of attorney's fees. In effect, the attorney would turn this into a contingency fee case. And although contingency fees are authorized by Article 8308-4.09(a) and the statute allows for consideration of the benefits to the claimant secured by the attorney to be considered in arriving at an appropriate fee, the Commission rules do not directly address contingency fees. For these reasons and in light of the modest recovery of additional TIBS by the claimant, we do not consider it appropriate in this case to award additional attorney's fees based on a success factor.

We note that a previous award of attorney's fees in the amount of \$1,230.00 has been made to the attorney based on her representation of the claimant in 1991 in connection with this same claim. Our affirmance of the award of attorney's fees in the instant appeal is subject to the statutory cap of 25% contained in Article 8308-4.09(e).

In sum, we find that the decision of the hearing officer was not an abuse of discretion.

The decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge